Supreme Court, U.S.
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No. 10- 09-943

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IN THE

Supreme Court of the United States

IN RE: TRICO MARINE SERVICES, INC.,

Debtor.

STEVEN SALSBERG AND GLORIA SALSBERG,

Appellants-Petitioners,

- against -

TRICO MARINE SERVICES, INC., TRICO MARINE ASSETS, INC., TRICO MARINE OPERATORS, INC.,

Appellees-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

After they became aware of facts that called into question whether false or misleading testimony was offered at the confirmation hearing at which the bankruptcy court, S.D.N.Y., approved the reorganization plan of Trico Marine Services, Inc. (and affiliates), Petitioners Steven Salsberg and Gloria Salsberg brought an adversary proceeding seeking, *inter alia*, revocation of the plan under section 1144 of the Bankruptcy Code. After a trial limited to the issue of whether false or misleading testimony had been provided, the bankruptcy court dismissed Petitioner's claim. The Southern District of New York and the Second Circuit affirmed the dismissal.

1. What guidelines and factors control when a party waives an issue at the trial court so as to allow a reviewing court to refuse to consider the issue on appeal, *Singleton v. Wulff*, 428 U.S. 106, 120 (1976), and does a party waive an issue she raised and asserted in the complaint, at trial, and in her post-trial proposed findings of fact and conclusions of law so as to have "provided that court with ample opportunity to make a reasoned judgment on the issue," *Goeke v. Branch*, 514 U.S. 115, 118 (1995) (per curiam), and "fairly put [the trial court] on notice as to the substance of the issue," *Nelson v. Adams, USA, Inc.*, 529 U.S. 460, 469 (2000)?

2. Applied to this case, did the Second Circuit and District Court err in finding that Petitioners waived controlling issues, including whether a debtor's CFO omitted material information in his confirmation-hearing testimony with scienter?

3. What guidelines and factors determine the factual and legal issues on which a trial court must make findings, and how specific such findings must be and, in particular, may a trial court ignore making findings on an issue that affects the outcome of the trial?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Steven Salsberg and Gloria Salsberg respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The summary order disposing of the appeal by the Second Circuit, which is set out at 2009 U.S. App. LEXIS 17751, is reproduced at App. A. The Second Circuit's unpublished order denying a petition for a panel rehearing and rehearing *en banc* is reproduced at App. D.

The district court's opinion and order affirming the bankruptcy court granting summary judgment to Defendants is published at 382 B.R. 201 (S.D.N.Y. 2008) and is reproduced at App. B.

The bankruptcy court's post-trial findings of fact and conclusions of law dismissing the adversary proceeding is published at 374 B.R. 529 (Bankr. S.D.N.Y. 2007) and is reproduced at App. C.

JURISDICTION

The Second Circuit issued its summary order on August 11, 2009, and its opinion and judgment were entered on August 11, 2009. (*See* App. A.) It denied Petitioner's petition for the panel's rehearing the case or for a rehearing *en banc* by order entered on

November 2, 2009. (App. D.)

This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS AND RULES

Rule 52(a), Federal Rules of Civil Procedure[1]

Rule 52. Findings by the Court; Judgment on Partial Findings

(a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its

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[1] Rule 52 was amended effective December 1, 2007, after the bankruptcy court's trial. Rule 52(a)(1) now reads,

> (1) *In General.* In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court. Judgment must be entered under Rule 58.

> action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in subdivision (c) of this rule.

Fed. R. Civ. P. 52(a).

Rule 7052, Federal Rules of Bankruptcy Procedure

Rule 7052. Findings by the Court

> Rule 52 F.R.Civ.P. applies in adversary proceedings.

Fed. R. Bankr. P. 7052.

Section 1144, United States Bankruptcy Code

> On request of a party in interest at any time before 180 days after the date of the entry of the order of confirmation, and after notice and a hearing, the court may revoke such order if and only if such order was procured by fraud. An order under this section revoking an order of confirmation shall –
>
> > (1) contain such provisions as are necessary to protect any entity acquiring rights in good faith reliance on the order of confirmation; and
> >
> > (2) revoke the discharge of the debtor.

11 U.S.C. § 1144

INTRODUCTION

Petitioners Steven Salsberg and Gloria Salsberg seek review of the Second Circuit's decision dismissing their case against Trico Marine Services, Inc. and affiliated companies ("Trico") for fraud, based on misrepresentations that Trico's chief financial officer (at that time), Trevor Turbidy made at Trico's confirmation hearing to have its pre-packaged reorganization plan confirmed. The Second Circuit, and the district court (the Southern District of New York) before it, and the bankruptcy court (the Southern District of New York) before it, dismissed Petitioners' case based on narrow findings, without considering all controlling issues that Petitioners asserted at every

relevant procedural step.

The bankruptcy court failed to satisfy its duties under rule 52(a) to "find the facts specially and state separately its conclusions of law," Fed. R. Civ. P. 52(a) (pre-Dec. 1, 2007 rule), and the Second Circuit and district court failed to follow clear Supreme Court precedent in reviewing the bankruptcy court's decision. The Second Circuit and district court failed to apply this Court's decisions in assessing whether Petitioners had waived material issues that they had, indeed, asserted to the bankruptcy court. And, the Second Circuit and district court failed to apply Supreme Court precedent in reviewing the bankruptcy court opinion, regarding rule 52(a).

Certiorari is sought because the Second Circuit's and district court's decisions puts them in conflict with prior Supreme Court holdings, Sup. Ct. Rule 10(c), and have "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power," Sup. Ct. Rule 10(a). In both aspects, important federal questions are involved.

Accordingly, *certiorari* is sought under Supreme Court Rules 10(a) and 10(c).

STATEMENT OF THE CASE

I. Proceedings Below

1. Background

On December 21, 2004, Trico Marine Services, Inc. filed a pre-packaged bankruptcy in the United States Bankruptcy Court for the Southern District of New York. Included in the filing was a disclosure statement and included within the disclosure statement were actual financial results through September 30, 2004 and projected "results" for the final, fourth quarter of 2004 and for future years.

The bankruptcy court held a hearing on January 19, 2005 to decide whether to confirm the reorganization plan that had been presented to it. During that hearing, the chief financial officer of Trico, Trevor Turbidy, was called to testify. He was asked how Trico's revenues in the final quarter of 2004 compared to those in its projections, and he testified that Trico's performance was "fairly consistent" with, "slightly higher" than, and "[n]ot materially" better than had been projected.[2]

After the confirmation hearing, the bankruptcy court confirmed the proposed plan of reorganization. When Trico formally reported its results for the final

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[2] The relevant testimony is laid out in the bankruptcy court's findings/conclusions, App. C, *infra*, at 36a-38a, as well as in the district court's opinion, App. B, *infra*, at 9a-13a.

quarter of 2004, though, it revealed that its revenues were indeed quite materially – it cannot be gainsaid that a 33% difference was not "material" by any definition – better than had been projected in the disclosure statement that Turbidy had endorsed in his testimony.

2. The Bankruptcy Court Proceeding

(a) The Complaint

Steven Salsberg held shares of Trico common stock which were converted into warrants pursuant to the Company's reorganization, and Gloria Salsberg received some of those warrants. With the actual, "dramatically higher" (as an internal Trico document described them) revenue figures in hand, they cried foul and commenced the adversary proceeding that is before this Court. Their claim is that Turbidy was not truthful in his testimony and that had he been so the bankruptcy court would not have confirmed the plan of reorganization and they, Petitioners, would not have lost their equity interest in the Company (as they did by the reorganization.)

This was because the "value" of Trico derived from its prospects. The disclosure statement set forth those prospects based on Trico's historical performance and extrapolated from there. By changing the very first projection upward by over 30% the entire extrapolation must also be changed upward, perhaps not by 30+% but surely by a significant amount and by enough, so it was alleged, to alter the bankruptcy court's decision to confirm the Company's reorganization plan.

Petitioners' claim was brought pursuant to section 1144 of the Bankruptcy Code. As parties in interest, they asserted that the bankruptcy court's confirmation order "was procured by fraud," 11 U.S.C. § 1144, and the bankruptcy court's jurisdiction was invoked pursuant thereto.

(b) Bifurcated Trial

The bankruptcy court decided to bifurcate the matter. Step one would determine whether Turbidy had, in fact, misrepresented matters or was misleading in his testimony. If so, step two would be for the bankruptcy court to determine whether this altered the result, i.e., whether the presented plan would have been approved in the form in which it had been.

After some motion practice, step one was held on May 21, 2007, a one-day trial.

Certain facts were not in dispute. For example, Trico's deterioration had reached its nadir in the first quarter of 2004, with revenue of $23.6 million, but actual revenue in the second and third quarter showed improvement (to $25.7 and $29.5 million, respectively). Nor was there a dispute that in the disclosure statement Trico projected revenue for the fourth quarter of 2004 of $24.9 million and that on January 19, 2005, the date of the confirmation hearing, Trico's preliminary revenue results for the fourth quarter of 2004 were approximately 33.7% above the projected figure – and that Turbidy knew it.

Nor was there a dispute about what Turbidy said on

the subject at the confirmation hearing. The bankruptcy court asked him "whether [Trico's] actual experience for the fourth quarter of 2004 was higher, lower, or consistent with the projected results?" Turbidy answered, "It was fairly consistent. Yes. It wasn't spot on, dollar for dollar" and then, "I believe it was slightly higher." Asked by an objector, "How much better?" Turbidy responded, "Not materially." (App. C, *infra*, at 36a-38a; see also App. B, *infra*, at 9a-13a for an elaboration of this testimony.)

At the trial, Turbidy testified. He contended that his earlier testimony concerned Trico's overall financial condition, not how one quarter's actual results compared to that quarter's projected results.

(c) Petitioners' Post-Trial Submissions

After the trial, the parties submitted proposed findings of fact and conclusions of law. As relevant here, Petitioners contended that: Turbidy knew that Trico's actual 2004Q4 revenue was approximately $33.3 million and that Trico's projected 2004Q4 revenue was only $24.9 million – one-third higher than projected – and that he knew that "because a large component of Trico's operating costs were fixed, between 70% and 80% [of this difference would normally] go 'straight down to EBITDA.'"[3] (See App. C, *infra*, at 35a.) Petitioners asserted that Trico's higher-than-projected revenue meant that the Company's

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[3] Earnings before interest, taxes, depreciation, and amortization.

prospects were more favorable than what was reflected in the now-stale disclosure statement.

In addition, Petitioners asserted that Turbidy made other material omissions with scienter, including Trico's expectations for January 2005 revenue and the impact and import of three unusually large special charges ("ULSC") that reduced Trico's 2004Q4 EBITDA, as compared to its projected EBITDA (as shown in Trico's internal documents) and that even if Turbidy had been thinking of Trico's overall financial condition when he testified, he misled the court by his omission of information known to him about quarterly results that were over one-third better than had been projected.

(d) The Bankruptcy Court's Findings

The bankruptcy court issued its post-trial findings of fact and conclusions of law on August 23, 2007. (Appendix C.)

1. As to the core issue of whether Turbidy had either (i) testified falsely when he swore at the confirmation hearing that Trico's actual fourth quarter results were "not materially" and "only slightly" higher than what was contained in the disclosure statement or (ii) misled the bankruptcy court by not disclosing that Trico's actual *revenue* was more than one-third higher than was projected, the bankruptcy court found that "by the time of the confirmation hearing, Turbidy knew that Trico had exceeded its fourth quarter projections of both revenue and EBITDA." (App. C, *infra*, at 40a.) But it further found that at the

confirmation hearing Turbidy's "answers were focusing on EBITDA," (*id.* at 45a), and Trico's valuation and ability to meet its interest expense, (*see id.* at 46a).

Turbidy's statement that the actual quarterly results were not "materially higher" than those that were projected, it continued, was not an actual misstatement because Petitioners did not show "that Turbidy's testimony was false," (*id.* at 46a), nor had Petitioners shown that he "intended to deceive the Court," (*id.* at 48a).

The bankruptcy court acknowledged that "Turbidy had a duty of candor, and hence, a duty to disclose material information." (*Id.* at 50a.) Yet it failed to address in this context the observation that Turbidy still acted improperly even if he was thinking about something other than revenue (i.e., EBITDA) when he answered the how-did-Trico-perform? question at the confirmation hearing *because he failed to mention the one-third higher revenue figure.*

The bankruptcy court did address the contention that EBITDA was unusually lowered by three ULSCs, and thus was not a meaningful proxy for how the Company had performed on an apples-to-apples basis and implied that Trico's normalized EBITDA was much higher. It found that Petitioners did not "prove that Turbidy intended to deceive the Court or anyone else by failing to highlight the special charges." (*Id.*) It excluded the $700,000 Redundancy reserve because "Turbidy was [not] aware of the impending charge." (*Id.*) The bankruptcy court said that Turbidy was aware of the impending Inventory Reserve ($1,500,000)

and UK pension ($2,700,000) charges but had not testified that the Inventory Reserve was not considered in the Projections. (*See id.*) But the bankruptcy court did not consider other omissions, such as the actual fourth quarter revenue. It thus ignored other material omissions and information that reflected upon the relevance and materiality of all three ULSCs, Trico's solvency, and Turbidy's scienter. And, the bankruptcy court failed to define "materiality" and applied a non-existent and irrelevant standard for materiality.

Under New York law, the bankruptcy court held, the elements of a common-law fraud claim are "a representation of fact, which is untrue and either known by defendant to be untrue or recklessly made, which is offered to deceive and to induce the other party to act upon it, and which causes injury." (App. C, *infra*, at 44a (citations and internal quotation marks omitted).) It redefined "offered to deceive and to induce the other party to act upon it," (*id.*), as *intent to deceive*, (*see id.* at 48a-52a), thus nullifying the relevance of the recklessness standard for fraud in New York.[4]

In the end, the bankruptcy court dismissed

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[4] In New York, "the law does not require . . . specific intent for a fraud claim." *Houbigant v. Deloitte & Touche, LLP*, 303 A.D.2d 92, 100, 753 N.Y.S.2d 493 (1st Dep't 2003). A plaintiff need only show "that the defendant was aware that its misrepresentations would be reasonably relied upon by the plaintiff, not that the defendant intended to induce the particular acts of detrimental reliance ultimately undertaken by the plaintiff." *Id.*

Petitioners' case based on the *narrow* finding that Petitioners had not shown that the solitary omission, the UK pension reserve, was omitted with the *intent to deceive* the court, despite Petitioners' assertions that Turbidy had made other material omissions, particularly the fourth quarter revenue, which he knew about and which was material because 70% to 80% of incremental revenue would normally drop down into EBITDA.

3. The District Court Opinion

Petitioners appealed to the district court, S.D.N.Y. (Cote, J.). Given that the trial had been for the limited purpose of determining whether Turbidy's testimony was false (with the bankruptcy court to have a later proceeding to determine whether such falsity affected its decision to confirm the reorganization plan), among other things they argued that this was established by the following undisputed facts:

- *First*, Trico's actual fourth quarter revenue was 33% higher than projected in the disclosure statement;

- *Second*, 70-80% of Trico's revenue normally went directly to its EBITDA;

- *Third*, Turbidy knew both of these facts – including receiving internal memos describing actual October and November 2004 revenues as being "dramatically higher" than was projected – when he testified that Trico's actual fourth quarter "performance" was not "materially

higher" than was projected.

The district court, though, affirmed the bankruptcy court. With respect to the foregoing, it brushed it aside by contending that it was an issue that Petitioners had waived by not raising it to the bankruptcy court. (App. B, *infra,* at 25a-26a.)

Regarding the *Actual Misstatement*, (see App. C, *infra,* at 44a-49a, and see App. B, *infra,* at 21a-25a), the district court said that the distinction between "intent to deceive" and "recklessness" did not matter "[b]ecause the bankruptcy court found that the statements [that Turbidy made] were in fact true," (id. at 24a). But, regarding the *Fraudulent Concealment*, relating to whether Turbidy with scienter had made a material omission, it affirmed the bankruptcy court opinion despite the bankruptcy court not having found whether all three ULSC omissions were material omissions. (*See* App. C, *infra,* at 49a-52a, and see App. B, *infra,* at 25a-27a.) For example, the $1.5 million inventory reserve omission was discarded, based on Turbidy's *intent* to the exclusion of any consideration of his *recklessness*. (*See* App. C, *infra,* at 50a.) (And, of course, no findings were made regarding the omission of the dramatically higher revenue.) Thus, based on recklessness as the standard, there were no findings as to whether Turbidy made a material omission. The district court affirmed the bankruptcy court opinion regarding the ULSC omissions by merely reiterating the latter's "intent to deceive" language without providing a *de novo* review of the legal standard for scienter by stating whether "intent to deceive" was a legal element of fraud, in addition to "recklessness."

(App. B, *infra*, at 26.)

Regarding the bankruptcy court's failing to define "materiality" and applying a non-existent and irrelevant standard for materiality, the district court ignored this issue in affirming the bankruptcy court opinion.

4. The Second Circuit's Decision

The Second Circuit said:

> Having conducted our own plenary review of the Bankruptcy Court's decision, we affirm for substantially the same reasons as those stated by the District Court in its thorough opinion.[5]

(App. A, *infra*, at 3a.)

Amongst Petitioners assertions were several errors of factual findings supporting the bankruptcy court's conclusions.[6] Nonetheless, the Second Circuit also "note[d] that to the extent that the Salsbergs challenge

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[5] Because the Second Circuit essentially adopted the district court's opinion, this Petition refers to the district court opinion and the Second Circuit opinion simply as the "DC/Second Circuit" opinion.

[6] For example, the bankruptcy court said Trico's estimated debt was $390 million, (see App. C, *infra*, at 33a), and that NeJame (Trico's expert that testified at the confirmation hearing) had opined that Trico's "value fell between $225 million and $245 million," (*id.* at 35a). Thus, according to NeJame's opinion, Trico's 2004 *Third* Quarter ending negative equity ranged between $145 million and $165 million – substantially less than the $240 million the bankruptcy court said he testified to.

certain of the Bankruptcy Court's factual findings regarding the valuation of Trico at the time of the confirmation hearing, none of these perceived inaccuracies in the court's calculations was sufficient to render its findings of fact as to whether Turbidy committed fraud clearly erroneous." (*Ibid.*)

REASONS FOR GRANTING THE PETITION

I. The Courts Below Disregarded This Court's Holdings on What Constitutes the Waiver of an Argument.

A party does not waive an issue, this Court and common sense dictate, when she presents it to a court below in a way that "provide[s] that court with ample opportunity to make a reasoned judgment on the issue." *Goeke* v. *Branch*, 514 U.S. 115, 118 (1995) *(per curiam)*. Here, neither the district court nor the Second Circuit acknowledged let alone followed this requirement. Instead both – the district court expressly and the Second Circuit by adoption – declined to consider a crucial aspect of Petitioners' claim by the expedient of saying it had not been raised in the bankruptcy court. It had been.

The Court should grant this petition, then, because the Second Circuit ignored this Court's mandate on the requisites for finding an argument to have been waived.[7]

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[7] Grounds for remand can be established by submission of and citations to the record, without the necessity of the parties

(footnote continued . . .)

Alternatively, the Court should grant the Petition to establish a clear rule for the lower federal courts as to what factors are to be considered and found before an argument-on-appeal is summarily rejected as having been waived. That neither the district court nor the Second Circuit here deigned to apply any analysis evidences the need for instruction from this Court.

1. The supposedly "waived" arguments here were crucial. Trico's CFO failed to disclose material facts when he testified at the Bankruptcy Court's hearing on whether to confirm Trico's plan of reorganization. Petitioners raised these (and other) issues at the Trial, asserting that they rendered his hearing testimony misleading. The district court, however, simply said, referring more generally to Petitioners' assertions, "these alleged omissions [were] raised for the first time on appeal," (App. B, *infra*, at 25a), and would not consider them, (*ibid*). The Second Circuit effectively adopted this. (App. A, *infra*, at 3a.)

Consider the most egregious omission tossed aside below as waived, that Petitioners *specifically* referred to as the primary omission that rendered Turbidy's confirmation hearing testimony misleading and which "'[w]ith full disclosure,'" would have shown the bankruptcy court that there was "'at least a material possibility that Trico's prospects were substantially improved.'" (App. B, *infra*, at 25a.) Trico's actual

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(footnote continued . . .)

burdening the Court with argument.

fourth quarter revenue was over one-third above what was in the disclosure statement as a "projection" circulated seeking approval of the Company's reorganization plan.[8] Turbidy knew this when he testified. (This was not disputed.) Asked how the Company had actually performed as against how it was projected to perform in the disclosure statement, Turbidy claimed that it was not "materially" better from his big-picture perspective. True as that testimony may have been,[9] it was not disputed that Turbidy did not inform the bankruptcy court that the actual revenue was so much above the projected revenue.

This, obviously, is an omission of some import. Actual past revenue was prologue to Trico's prospects and ultimately to the fairness of the reorganization plan that Trico sought to have the bankruptcy court confirm.

As an aside, it is important to remember the limited

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[8] Trico's dramatic improvement in revenue (as compared to the Projections) was a material omission "because a large component of Trico's operating costs were fixed, between 70% and 80% of any additional revenue would go 'straight down to EBITDA.'" (See App. C, *infra*, 35a.) The revenue improvement implied that actual EBITDA was two and a half times projected EBITDA, which would translate into a substantially higher value.

[9] Petitioners contended that his testimony affirmatively misrepresented the Company's state of affairs, but the bankruptcy court rejected that contention, finding that Turbidy was speaking of something other than "revenue" when he testified. (*Supra*, at 10.) This finding is not before the Court in this Petition.

purpose of the trial held in this case. It was not to decide whether the bankruptcy court was influenced by the false testimony alleged to have been made, including via omissions. The bankruptcy court bifurcated the proceedings. The trial was to determine whether misstatements had been made with the requisite state-of-mind at the confirmation hearing or whether there was a failure to make certain disclosures necessary so that the statements made were not misleading.

2. Again, this Court holds that a party raises an issue if she has done so in a manner that "provided that court with ample opportunity to make a reasoned judgment on the issue." *Goeke* v. *Branch*, 514 U.S. at 118. "[T]his principle does not demand the incantation of particular words; rather, it requires that the lower court be fairly put on notice as to the substance of the issue." *Nelson v. Adams, USA, Inc.*, 529 U.S. 460, 469 (2000) (citing *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 174-75 (1988)).

1. Petitioners raised the supposedly waived-argument at every opportunity below

How did Petitioners raise the issue, for example, of the nondisclosure of the actual fourth quarter performance? It was not buried in the recesses of some obscure filing. It was front and center again and again in what was presented to the bankruptcy court, asserted at every relevant procedural step. Petitioners asserted that Turbidy misled the bankruptcy court by omitting Trico's 2004 Fourth Quarter revenue:

- In their amended complaint.
- At trial.
- In their proposed findings of facts.
- In their proposed conclusions of law
- In their proposed reply findings of fact
- In their proposed reply conclusions of law.

It was also raised to, but ignored by, the district court and to the Second Circuit.[10]

For example, in their proposed findings of fact to the bankruptcy court, Petitioners said:

> Insofar as the Court might construe Turbidy's testimony at the trial that he testified only regarding EBITDA as a measure of Trico's financial health, when Turbidy testified regarding Trico's financial health at the Confirmation Hearing (and notwithstanding any concern regarding the Unusually Large

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[10] Petitioners asserted two other omissions that the DC/Second Circuit contended were waived. They asserted to the bankruptcy court in their post-trial briefs and also in briefs on appeal that Turbidy also omitted (1) that Trico's January 2005 revenue was dramatically higher, and (2) that Trico had leased out several of its vessels that were at below market fixed-rate contracts that would soon expire and be renegotiated at higher (to Trico) market rates. Petitioners also asserted this below-market fixed-rate contract issue at the trial.

> Special Charges), Turbidy misled the Court when he said that Trico's 2004 Fourth Quarter was fairly consistent with their projections because
>
> "the operating results, (a) particularly Revenue . . ., substantially exceeded Trico's projections for those respective results," and
>
> "he did not clarify to the Court that he was not considering other components of Trico's operating performance – namely revenue."

(Pl. Prop. Findings of Fact, ¶¶ 128-129 (blackline copy) (2d Cir. Appendix, A-445-46).) And, in Petitioners' proposed conclusions of law to the bankruptcy court, Petitioners said:

> And Turbidy knew that had he revealed what he knew regarding Trico's actual 2004 Fourth Quarter revenue, and/or EBITDA, the entire Financial Projections would have been cast with doubt and the valuation opinion (that was dependant upon the Financial Projections) that had been rendered in support of the Plan would have become highly questionable, at best.

(Pl. Prop. Concl. Of Law, 40-41, Part 2.(a)(i).)

If ever a party wanted to provide a trial court "with ample opportunity to make a reasoned judgment on the issue," Petitioners did it to the bankruptcy court in this case. *Goeke* v. *Branch,* 514 U.S. 115, 118 (1995) *(per*

curiam). Yet they – Petitioners and the issues – were summarily ignored by the district court and the Second Circuit. This was a fundamental miscarriage, sufficient to exhibit a disregard of what should be, and would be were this Court's jurisprudence attended to, self-evident. You raise an issue, you get a fair hearing on it.

Turning a blind-eye to this, the reviewing courts said that "there is no evidence that appellants raised any of these particular omissions before the bankruptcy court." (App. B, *infra,* at 25a.) To the contrary, there was clear and ample support in the record establishing that Petitioners raised them at every relevant procedural step. The argument was not waived.

The district court continued, "Although they now contend that there was certain information 'Turbidy was obliged to disclose even if he was not being deceptive in the answers he gave to the questions he was asked,'" i.e., accepting the bankruptcy court's conclusion that Turbidy spoke truthfully so far as he went, "appellants represented before the bankruptcy court that the court did not need to 'determine that Turbidy had an affirmative, independent obligation to disclose' anything." (*Ibid.*)

Petitioners' point, made in their reply proposed conclusions-of-law to the bankruptcy court, was that that court did not have to make that Turbidy had an obligation to disclose the omissions that was independent from clarifying any misleading elements of his testimony *because* Turbidy had a clear

"obligation to disclose . . . as an officer testifying at a confirmation hearing for a debtor-in-possession 'answering' specific questions whose testimony would be misleading – how Trico performed in the Fourth Quarter – were those charges not disclosed."[11] That the district court could construe this observation into a waiver surely reflects a results-first determination by that court, and the Second Circuit afterward.

The 2004 Fourth Quarter revenue omission was more relevant, in terms of establishing that Turbidy omitted a material fact, than any other omission that Petitioners asserted before the bankruptcy court, including the omissions that the bankruptcy court considered regarding whether Turbidy omitted a *material* fact with scienter.

To be clear, Petitioners detailed in their brief to the Second Circuit where and how they asserted to the bankruptcy court that Turbidy misled the bankruptcy court with scienter by failing to disclose the one-third

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[11] The relevant paragraph reads:

> Nor need the Court determine that Turbidy had an affirmative, independent obligation to disclose at the Confirmation Hearing the unusually large special charges that Trico took in December 2004. His obligation to disclose arises from his position as an officer testifying at a confirmation hearing for a debtor-in-possession "answering" specific questions whose testimony would be misleading B how Trico performed in the Fourth Quarter B were those charges not disclosed.

(Pl. Reply Prop. Concl. Of Law at 7.)

improvement in fourth quarter revenue between the projected and the actual figures. There was also an omission of the fact that below market fixed-rate contracts were soon to expire and would be renegotiated, with the Company receiving substantially more based upon the higher market rates, and another omission of the January 2005 revenue. Petitioners thus "provided [the bankruptcy court] with ample opportunity to make a reasoned judgment on the issue," *Goeke* v. *Branch,* 514 U.S. at 118, by "fairly put[ting the bankruptcy court] on notice as to the substance of the issue," *Nelson v. Adams, USA, Inc.*, 529 U.S. at 469. By ignoring Petitioners' detailing of these assertions, the Second Circuit (and the district court before it) chose and applied the incorrect legal standard as to when and how an issue is waived.

This Court's observation in *Singleton v. Wulff*, that an appellate court need not consider an issue not raised below, 428 U.S. 106, 120 (1976), then, had no application to this case for the simple reason that the issue was raised below. The Second Circuit did not apply the correct legal standard.

II. The Courts Below Disregarded This Court's Holdings as to Satisfying the Requirements, Under Rule 52(a), to "Find the Facts Specially and State "its Conclusions of Law Separately"

This Court is unequivocal: "[I]t is the duty of the [trial] court appropriately and specifically to determine all the issues which the case presents." *Interstate Circuit v. United States*, 304 U.S. 55, 56 (1938). *See also* Fed. R. Civ. P. 52(a) (applicable to adversary

proceedings by Fed. R. Bankr. P. 7052). Thus mere "conclusory, general findings do not constitute compliance with Rule 52's direction to 'find the facts specially and state separately . . . conclusions of law thereon.'" *Commissioner v. Duberstein*, 363 U.S. 278, 292 (1960) (quoting Fed. R. Civ. P. 52(a)). *See also Kelley v. Everglades District*, 319 U.S. 415, 420-22 (1943). "Where the trial court fails to make findings, *or to find on a material issue*, and an appeal is taken, the appellate court will normally vacate the judgment and remand the action for appropriate findings to be made." *Pullman-Standard v. Swint*, 456 U.S. 273, 292, n.22 (1982) (quoting 5A J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE § 52.06[2] (1982)) (emphasis added in *Pullman-Standard*).

1. After the Trial, the bankruptcy court was itself silent about whether Turbidy was culpable for his silence about the fact (which the bankruptcy court found was known to him) that Trico's actual fourth quarter revenue was some one-third above what had been projected in the disclosure statement. It found that his confirmation-hearing testimony was broader than simply about revenue and thus was not in and of itself false, (App. C., *infra*, at 44a-49a), but it failed to determine whether the testimony was still lacking.

Rule 52 is designed to address just this sort of deficiency. Turbidy may not have lied. But did he deceive? The underlying facts were found, i.e., the one-third improvement and Turbidy's knowledge of it when he testified at the confirmation hearing. But the ultimate question of whether Turbidy deceived by not mentioning the fourth quarter revenue results was not

addressed.

Nor did the bankruptcy court make a finding as to whether Turbidy was culpable if he were reckless in his silence. It found that he did not intend to deceive in his confirmation hearing testimony. But although applicable New York law allows liability for recklessness, *see Suez Equity Investors, L.P. v. Toronto-Dominion Bank*, 250 F.3d 87, 104 (2d Cir. 2001); *Jo Ann Homes at Bellmore, Inc. v. Dworetz*, 25 N.Y.2d 112, 302 N.Y.S.2d 799, 250 N.E.2d 214, 217 (N.Y. 1969); *see also Houbigant v. Deloitte & Touche, LLP*, 303 A.D.2d 92, 100, 753 N.Y.S.2d 493 (1st Dep't 2003) ("[T]he law does not require . . . specific intent for a fraud claim."), this additional issue was not commented upon by the bankruptcy court.

2. For their parts, the district court and Second Circuit had a duty to consider whether the bankruptcy court made findings on all relevant facts and issues. They failed to do that, merely reiterating the bankruptcy court's findings. (App. B., *infra*, at 26a.) They thus compounded a mistake on a core issue; "[T]here must be findings, . . ., which are sufficient to indicate the factual basis for the ultimate conclusion." *Kelley v. Everglades District*, 319 U.S. at 422. Here, the ultimate conclusion was dismissal of Petitioners' case, which should only have occurred had the bankruptcy court found that Turbidy had not provided misleading testimony with scienter.[12] But the findings

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[12] The issue at trial was not whether the bankruptcy court was misled by Turbidy's testimony but whether Turbidy's (footnote continued . . .)

the bankruptcy court did make were narrow – that the single $2.7 million UK pension plan charge omission was not a material omission made with intent to deceive. It was otherwise silent, and this silence is not permitted by rule 52.

1. Other Omissions

(a) Inventory Reserve Special Charge Omission

When the bankruptcy court considered the ULSCs as omissions, having found that Turbidy had "a duty to disclose material information," (App. C., *infra*, at 50), it excluded from consideration the $1.5 million inventory reserve omission in a conclusory manner that does not comport with rule 52(a).

The bankruptcy court found that Turbidy "foresaw" the charge, but excluded it from being considered as an omission because Turbidy "never testified that the inventory reserve (ultimately, $1.5 million) was not taken into account when Trico made its 2004 projections." (App. C., *infra*, at 50.)

The bankruptcy court failed to explain why Turbidy's silence, knowing about the charge, was not an omission made with scienter. He knew about the charge, so even if Turbidy did not know whether it was

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(footnote continued . . .)

testimony was false or at least misleading and whether Turbidy was culpable for it.

in the projections, it was still a controlling fact because of the material possibility that such charge was not in the projections, which in fact it was not (as shown in the record (with Trico's internal documents)). And, the bankruptcy court failed to explain how Turbidy did not know whether such charge was in the projections, considering that he had testified that he had prepared the projections along with a team that he had headed. At the least, Turbidy knew that the inventory reserve charge might not be in the Projections, and was thus worthy of the bankruptcy court's attention. It was thus a *material* omission. And, because Turbidy knew about the substantially higher revenue, to any extent that he didn't know about the ULSCs, he would have understood that EBITDA (and/or the ULSCs that he knew about) would be commensurately higher.

The Court should grant this petition because the DC/Second Circuit simply ignored rule 52 and its fundamental requirement that controlling facts be given their due regard.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 1, 2010

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APPENDIX A

APPENDIX A: SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AUGUST 11, 2009

2009 U.S. App. LEXIS 17751

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 11th day of August, two thousand nine.

PRESENT:
GUIDO CALABRESI,
BARRINGTON D. PARKER,
REENA RAGGI,
Circuit Judges.

No. 08-1553-bk

IN RE: TRICO MARINE SERVICES, INC.
TRICO MARINE SERVICES, INC.,

Debtor,

APPENDIX A

STEVEN SALSBERG, GLORIA SALSBERG,

Plaintiffs-Appellants,

v.

TRICO MARINE SERVICES, INC., TRICO MARINE ASSETS, INC., TRICO MARINE OPERATORS, INC.,

Defendants-Appellees.

Appeal from a judgment of the United States District Court for the Southern District of New York (Cote, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is AFFIRMED.

Plaintiffs-Appellants Steven and Gloria Salsberg (the "Salsbergs") appeal from a judgment of the District Court dismissing their appeal from a judgment of the Bankruptcy Court for the Southern District of New York, which had dismissed the Salsbergs' adversary proceeding brought pursuant to 11 U.S.C. § 1144. The Bankruptcy Court (Bernstein, *C.J.*) had held, after holding a trial on this issue, that Trevor Turbidy, the then-CFO of Defendants-Appellees Trico Marine Services, Inc., Trico Marine Assets, Inc., and Trico Marine Operators, Inc. (collectively "Trico"), had not committed fraud while testifying at the con-

firmation hearing for Trico's Chapter 11 reorganization plan. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues raised on appeal.

"When a district court acts as an appellate court in an appeal from an order of the bankruptcy court, its determination is subject to plenary review." *In re Dairy Mart Convenience Stores, Inc.*, 411 F.3d 367, 371 (2d Cir. 2005). As such, we review the Bankruptcy Court's decision, accepting its findings of fact unless they are clearly erroneous and reviewing its legal conclusions *de novo*. *See Kuhl v. United States*, 467 F.3d 145, 147 (2d Cir. 2006).

Having conducted our own plenary review of the Bankruptcy Court's decision, we affirm for substantially the same reasons as those stated by the District Court in its thorough opinion. We also note that to the extent that the Salsbergs challenge certain of the Bankruptcy Court's factual findings regarding the valuation of Trico at the time of the confirmation hearing, none of these perceived inaccuracies in the court's calculations was sufficient to render its findings of fact as to whether Turbidy committed fraud clearly erroneous. *See Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 168 (2d Cir. 2001) ("'A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948))).

We have considered the Salsbergs' remaining arguments and find them to be without merit.

APPENDIX A

For the foregoing reasons, the judgment of the District Court is hereby **AFFIRMED**.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

By: _____/s/_____

APPENDIX B

APPENDIX B: OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED FEBRUARY 21, 2008

382 B.R. 201
07 Civ. 8422 (DLC)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE TRICO MARINE SERVICES,

Debtor.

STEVEN SALSBERG, ESQ. and GLORIA SALSBERG,

Plaintiffs/Appellants,

-v-

TRICO MARINE SERVICES, INC., TRICO MARINE ASSETS, INC., and TRICO MARINE OPERATORS, INC.,

Defendants/Appellees.

OPINION & ORDER

APPENDIX B

DENISE COTE, District Judge:

Appellants Steven Salsberg ("Mr. Salsberg") and his mother Gloria Salsberg ("Ms. Salsberg") (collectively, the "Salsbergs" or the "appellants") appeal from the judgment entered in this adversary proceeding by the United States Bankruptcy Court for the Southern District of New York (Bernstein, C.J.). They also appeal from the bankruptcy court's denial of their motion to amend their pleadings. For the following reasons, the decisions of the bankruptcy court are affirmed.

BACKGROUND

I. Trico's Bankruptcy

These facts are not in dispute, and are drawn from the decisions of the bankruptcy court. See In re Trico Marine Servs., Inc., 374 B.R. 529 (Bankr. S.D.N.Y. 2007) ("Trico IV"); In re Trico Marine Servs., Inc., 360 B.R. 53 (Bankr. S.D.N.Y. 2006) ("Trico III"); In re Trico Marine Servs., Inc., 343 B.R. 68 (Bankr. S.D.N.Y. 2006) ("Trico II"); In re Trico Marine Servs., Inc., 337 B.R. 811 (Bankr. S.D.N.Y. 2006) ("Trico I"). In 2001, Trico Marine Services, Inc., a business providing marine support services to the oil and gas industry, began experiencing a precipitous decline in its operating results. (Trico Marine Services, Inc. and its domestic subsidiaries, Trico Marine Assets, Inc. and Trico Marine Operators, Inc., will be referred to collectively as "Trico"). Trico began negotiating a pre-petition bankruptcy plan with a group of its debtors in June 2004. The parties reached agreement in September

2004 on a plan that proposed to cancel Trico's existing common stock and to distribute new common stock to certain debtors in satisfaction of their claims. Holders of the old, cancelled common stock would receive warrants exercisable at times and prices set forth in the proposal.

Trico filed a disclosure statement outlining the plan with the Securities and Exchange Commission on November 12, 2004. Exhibit C to the disclosure statement included Trico's financial projections for revenue and EBITDA (earnings before interest, taxes, depreciation, and amortization) from 2004 through 2009. Trico projected total revenue of $103.7 million and EBITDA of $13.6 million for 2004. These projections were based on Trico's actual financial results through September 30, 2004, and the projected results for the fourth quarter.

Trico commenced prepackaged bankruptcy proceedings on December 21, 2004. At the time, its estimated total pre-restructuring indebtedness was nearly $400 million, and its interest expense for 2004 was estimated to be $32.4 million. Approximately $250 million of Trico's indebtedness was attributable to its Senior Notes; an additional $28.4 million was attributable to interest on those Notes. The prepackaged plan presented to the bankruptcy court would eliminate the entire Senior Note debt. As The Honorable Stuart M. Bernstein observed, "[a]bsent confirmation, the projected 2004 EBITDA would fall approximately $19 million short of the amount needed just to pay the 2004 interest expense due on the Senior Notes." Trico IV, 374 B.R. at 533. Mr. Salsberg, a Trico

shareholder, filed an objection to the plan on January 10, 2005.

II. Plan Confirmation

A hearing was held on January 19 to address the disclosure statement, the plan, and Mr. Salsberg's objection. Trico's sole witness, Richard NeJame, a director in the restructuring advisory group at Lazard Freres, was qualified to testify as an expert in the fields of valuation and restructuring. NeJame described his extensive due diligence of Trico, and opined that Trico was insolvent. Absent the restructuring, NeJame testified, Trico's shareholders would receive nothing. Were the restructuring approved, the Senior Noteholders would receive between thirty-five and forty-five percent of what they were owed.

Mr. Salsberg cross-examined NeJame, who testified that his valuations of Trico were based on information available to him in October 2004. He had not updated his estimates based on subsequent data, and he did not know Trico's fourth quarter results. Under questioning from Mr. Salsberg concerning the potential effects of any misstatements contained in Trico's revenue projections, NeJame averred that, because a large component of Trico's operating costs were fixed, between seventy and eighty percent of any additional revenue would go "straight down to EBITDA." That is, NeJame clarified, any error in revenue projection would "make a big difference in the EBITDA bottom line." NeJame emphasized, however, that his valuation of Trico assumed a quadrupling in EBITDA from 2004 to 2008.

APPENDIX B

Mr. Salsberg called as his sole witness Trevor Turbidy, Trico's chief financial officer. Because the instant action turns entirely on Turbidy's testimony, it is quoted at some length. The direct examination began as follows:

> Q: Good afternoon. Do you know what the fourth quarter revenues are for Trico?
>
> A: We have not finished our fourth quarter consolidation yet. So, no, I don't have an estimate for that number.
>
> Q: Do you have a preliminary estimate?
>
> A: I wouldn't be allowed to disclose that under FD at this point.

According to Chief Judge Bernstein, Turbidy's reference to FD was to SEC Regulation FD, 17 C.F.R. § 243.100 et seq., which prohibits certain disclosures of material non-public information regarding an issuer or its securities. At this point in the examination, counsel for Trico objected, reiterating Turbidy's FD concern and questioning the relevance of Mr. Salsberg's examination. The bankruptcy court engaged the parties in a brief colloquy concerning the objections. The colloquy, in pertinent part, went as follows:

> TRICO COUNSEL: I think the issue that we have here as Mr. Turbidy has testified is that he doesn't have the actual and with regard to preliminary I'm just not quite sure why that's probative when at this point [in] time there could be a number

of variables that would not be included in a preliminary est[im]ate. So the point is given the risk of inadvertent FD and the fact that it's very preliminary just doesn't really serve any probative value.

THE COURT: What's the probative value of a preliminary estimate when the -- what's the probative value of a preliminary estimate?

MR. SALSBERG: The probative value is that they're saying that revenue growth isn't that great and I think maybe it is and I'm trying to find out.

THE COURT: But you're talking about one more quarter since projections.

MR. SALSBERG: Well, they bottomed out in the first quarter of '04 and then since then they grew very, very handsomely in the second and third quarter compared to the first quarter of '04. If the fourth quarter of '04 is up that shows-- that shows that very positive things are happening and then -- and they said that their revenue is only going to increase 5 point something percent from '04 to '05. That may imply that their forecasts are far too conservative to be reasonable.

TRICO COUNSEL: Your Honor, if I could just address that point again. The plan here,

the projections in the plan are based on five years which is twenty quarters. An up tip [sic] in one quarter is just not going to be material, number one. Number two, I think this is the same situation we've seen in other cases. The plan is not necessarily about hitting a number precisely on the nose. I fail to see the probative value especially when weighed against the prejudice of an FD disclosure, the fact that it's extremely preliminary.

. . .

THE COURT: I'm going to overrule the objection. The argument is that if they exceeded expectations for this quarter maybe their future projections are also conservative or too conservative. That's what the argument is.

. . .

TRICO COUNSEL: Your Honor, if I may just briefly. Would it be possible to alter the questions that the question is directed in such a way as to whether there's been any material change in the financial circumstance of the company in the last two months which would change the valuation conclusions?

The court then proceeded to question Turbidy:

APPENDIX B

THE COURT: Let me ask the question. What did you project – did you have a projection for the fourth quarter of 2004?

TURBIDY: Yes, we did.

THE COURT: What was that projection?

TURBIDY: I don't recall the exact number of revenue projections.

THE COURT: Is that in the disclosure statement?

TRICO COUNSEL: Your Honor, I don't believe it is is [sic] an aggregate number. I think it's just a 2004 yearly which based on the time this was prepared I believe there would have been two quarters of actual results and two quarters of projected results contained in the aggregate for '04.

THE COURT: Do you recall whether your actual expense for the fourth quarter of 2004 was higher, lower or consistent with the projected results?

TURBIDY: In total 2004 was consistent with our projections.

THE COURT: Just the last quarter?

TURBIDY: It was fairly consistent, yes. It wasn't spot on dollar for dollar.

> THE COURT: It is higher or lower?
>
> TURBIDY: I believe it was slightly higher.
>
> THE COURT: I'll take that answer they higher [sic] – they did better than they projected. I understand their concern about disclosing in a court, particularly a preliminary analysis, but they're saying they did better. I think that answers your question.

Mr. Salsberg intervened at this point and asked, "How much better?" Turbidy replied, "Not materially."

Chief Judge Bernstein overruled Mr. Salsberg's objection and confirmed the plan. He credited NeJame's testimony concerning the value of Trico, and concluded that the company was "hopelessly insolvent." Chief Judge Bernstein made no mention of Turbidy or his testimony in his decision. Mr. Salsberg did not appeal from the order confirming the plan.

III. The Adversary Proceeding

Following confirmation of the plan, Mr. Salsberg transferred some of the warrants distributed thereunder to Ms. Salsberg. Together, on July 19, 2005, they commenced an adversary proceeding before the bankruptcy court to vacate the confirmation order pursuant to 11 U.S.C. § 1144, which provides that a plan of confirmation may be revoked "if and only if such order was procured by fraud." The Salsbergs claimed that Turbidy's testimony at the confirmation hearing had been perjurious and that the plan

confirmation had therefore been procured by fraud. Specifically, they contended that Turbidy had lied when he testified that the 2004 fourth quarter results were fairly consistent with, and slightly but not materially higher than, Trico's fourth quarter projections. At the time of Turbidy's testimony, the Salsbergs contended, he knew that Trico's fourth quarter revenue and EBITDA were substantially higher than the projections. They argued that his testimony was intended to mislead the court into believing that Trico was in worse financial condition than it actually was, compelling the court to approve the bankruptcy plan, from which, the Salsbergs alleged, Turbidy would benefit personally.

By Opinion dated January 6, 2006, the bankruptcy court ruled that it could not revoke the plan under Section 1144 because the plan "would be exceedingly difficult to unwind and impossible to protect innocent third parties." Trico I, 337 B.R. at 815. The court granted the Salsbergs leave to amend their complaint within thirty days "to seek other, appropriate relief, if any." Id. at 816. The Salsbergs moved for reconsideration. The bankruptcy court granted the motion for reconsideration, but adhered to its original decision denying revocation under Section 1144. Trico II, 343 B.R. at 68.

The Salsbergs then amended their complaint, demanding damages from Trico under Section 1144 and alleging that Trico had committed a "fraud on the court." Following this amendment, the Salsbergs moved to amend their complaint again to add Turbidy as a defendant in the fraud-on-the-court claim. By

Opinion dated November 22, 2006, the bankruptcy court denied the Salsbergs' motion to amend. The court ruled that, based on Second Circuit law, amendment would be futile for three reasons: (1) the Salsbergs' claims against Turbidy rested solely on his alleged perjury; (2) the Salsbergs failed to allege that an officer of the court perpetrated the fraud; and (3) the proposed amended complaint failed to allege that Mr. Salsberg had no opportunity to demonstrate the falsity of Turbidy's testimony. The Salsbergs moved for reconsideration, and the bankruptcy court denied that motion. Trico III, 360 B.R. at 60-61.

On May 21, 2007, the bankruptcy court conducted a trial on the Salsbergs' fraud claim against Trico. The trial was limited to the single question of whether Turbidy knowingly lied about Trico's fourth quarter results with the intent to deceive the court at Trico's confirmation hearing. Turbidy, Mr. Salsberg, and Ms. Salsberg testified at the trial.[1] According to the bankruptcy court, the trial evidence showed the following. First, by the time of the confirmation hearing, Turbidy knew that Trico had exceeded its fourth quarter projections of both revenue and EBITDA. Trico had projected $24.9 million in fourth quarter revenue, but had achieved actual revenue of $33.3 million – approximately 34% higher than projected. Likewise, Trico had projected fourth quarter EBITDA of $4.1 million, but the aggregate EBITDA for

[1] Mr. Salsberg and Ms. Salsberg testified only with regard to Ms. Salsberg's standing, an issue the bankruptcy court had raised sua sponte.

October and November alone totalled $5.599 million – approximately 33% higher than projected, even absent December's actual results. Second, although he had received December 2004 revenue figures, Turbidy had not received information regarding December 2004 EBITDA by the time he testified at the confirmation hearing, but he anticipated an unusually large charge during the quarter attributable to a British pension plan supported by Trico. At the time of the confirmation hearing, Turbidy did not know the actual number representing the charge, but he understood that the charge would "severely impact" fourth quarter EBITDA. Trico IV, 374 B.R. at 536. Third, information supplied after the confirmation hearing revealed that EBITDA was negative in December, bringing fourth quarter EBITDA down to $5.4 million – still approximately 32% higher than projected. Operating expenses were also higher in the fourth quarter due to three special charges: $2.7 million for the British pension plan, $700,000 for adjustment to a redundancy reserve, and $1.5 million for an inventory reserve. Fourth, when Turbidy testified that Trico's fourth quarter results were fairly consistent with, and slightly but not materially higher than, its projections, he was focused on EBITDA and not revenue. The Salsbergs contended at trial that he had been focused on revenue.

The bankruptcy court deemed Turbidy's testimony at trial to be credible, and "found him to be honest, candid and forthright," Trico IV, 374 B.R. at 536, and therefore ruled that at the time of his testimony, Turbidy "held the honest belief that the actual results for the fourth quarter EBITDA, which were not then

final and were subject to credit and other adjustments, including a large UK pension charge, would not be appreciably higher or materially better than the fourth quarter EBITDA projection." Id. at 540. With regard to the materiality of the discrepancy between Trico's projected fourth quarter EBITDA and its higher actual results, the bankruptcy court ruled that "when Turbidy testified that fourth quarter EBITDA was slightly but not materially higher, he was referring in general to the valuation of Trico, and specifically, to the effect that the slightly higher quarterly EBITDA had on Trico's ability to meet a $9 million quarterly interest expense." Id. The court further ruled that, although Turbidy had a duty to disclose material information, his failure to inform the court of the pending British pension charge did not evidence an intent to deceive the court or anyone else. Id. at 540-41. Accordingly, Chief Judge Bernstein ordered the adversary proceeding to be dismissed.

Appellants timely filed their notice of appeal on September 28.[2] They seek review of the bankruptcy court's August 24, 2007 judgment after trial as well as its November 22, 2006 denial of their motion to amend their complaint to bring a fraud-on-thecourt claim against Turbidy.

---

[2] Appellants sought leave to file an oversized and corrected reply brief on December 14, 2007. Their motion was granted on January 22, 2008, and appellants' Corrected Reply Brief was considered in connection with this appeal.

DISCUSSION

I. Standard of Review

A district court "may affirm, modify, or reverse a bankruptcy judge's judgment, order, or decree." Fed. R. Bankr. P. 8013. On appeal, the legal conclusions of the bankruptcy court are reviewed de novo, but the findings of fact are reversed only when they are "clearly erroneous." Kuhl v. United States, 467 F.3d 145, 147 (2d Cir. 2006) (citation omitted) (per curiam); In re Worldcom, Inc., 339 B.R. 836, 840 (S.D.N.Y. 2006). "While the trial court's findings of fact are not conclusive on appeal, the party that seeks to overturn them bears a heavy burden." In re Miner, 229 B.R. 561, 565 (B.A.P. 2d Cir. 1999). The reviewing court must be left with a "definite and firm conviction" that a mistake has been made. Ortega v. Duncan, 333 F.3d 102, 107 (2d Cir. 2003) (citation omitted). Where the trial court's "factual finding is based upon a credibility determination, we are mindful that particularly strong deference should be granted to the finding in light of the factfinder's unique ability to assess the witness." Id. (citation omitted).

II. Turbidy's Alleged Misrepresentations

As the bankruptcy court correctly observed, New York law governed the Salsbergs' fraud claim. Under New York law, a "'fraud claim is defined as a representation of fact, which is untrue and either known by defendant to be untrue or recklessly made, which is offered to deceive and to induce the other party to act upon it, and which causes injury.'" Trico

IV, 374 B.R. at 537 (quoting Suez Equity Investors, L.P. v. Toronto-Dominion Bank, 250 F.3d 87, 104 (2d Cir. 2001). The trial focused on the truthfulness of Turbidy's statements at the confirmation hearing and, to a lesser extent, his scienter in offering them.

Appellants contend that the bankruptcy court clearly erred in finding that Turbidy had testified truthfully about Trico's financial condition at the confirmation hearing. They contend that Turbidy's statements that Trico's fourth quarter results were "consistent with our projections," "slightly higher" than those projections, and "[n]ot materially" better than those projections were false and misleading, and that Turbidy's failure to inform the court of certain charges that would depreciate Trico's fourth quarter EBITDA was intentional and purposefully misleading. Because appellants have not demonstrated that the bankruptcy court's findings were clearly erroneous, the decision of the bankruptcy court is affirmed.

The bankruptcy court determined that Turbidy's testimony was not false because that testimony turned on Trico's EBITDA, not revenue, and Turbidy's statements were honest and truthful with regard to EBITDA in light of the purpose for which the confirmation hearing was held, i.e., the valuation of Trico. Appellants cavil to varying extents with both of these propositions.

A. Turbidy's Focus on EBITDA

The bankruptcy court determined that Turbidy's confirmation hearing testimony focused on EBITDA,

and not revenue, based on Turbidy's responses to the court's questions during the confirmation hearing, Trico's public filings in connection with its reorganization, and Turbidy's testimony at trial. At the confirmation hearing, Turbidy was asked about Trico's "revenue" as well as its "actual experience." He uniformly replied with reference to EBITDA because, the bankruptcy court found, "EBITDA (and cash flow) directly reflected Trico's financial health and the ability to pay its bills." Trico IV, 374 B.R. at 538. This was corroborated by Trico's Form 10K, published after the confirmation hearing and admitted into evidence at trial, which stated that during Trico's reorganization, the company focused "primarily on cash flow from operations and net changes in cash and cash equivalents in order to fund operations, maintain the fleet and service its debt." Id. Finally, Turbidy testified at trial that he understood the questions at the confirmation hearing to focus on Trico's EBITDA, and the court specifically noted that it found "that Turbidy testified credibly when he said that his answers were focusing on EBITDA, not revenue." Id.

Appellants scarcely contend that this finding is clearly erroneous. At most, they intimate that Turbidy may have been "confused" about the basis for his testimony, and that the bankruptcy court therefore erred in determining that the testimony was based on EBITDA. This is insufficient to shoulder appellants' weighty burden in overturning a trial court's finding of

fact.[3]

B. The Truthfulness of Turbidy's EBITDA Statements

Appellants rest the gravamen of their appeal on a challenge to the bankruptcy court's finding that Turbidy's testimony with respect to Trico's EBITDA was not false. They contend that Turbidy's statements that Trico's fourth quarter EBITDA was "consistent with our projections," "slightly higher" than those projections, and "[n]ot materially" better than those projections were patently false in light of the fact that Trico's actual fourth quarter EBITDA was approximately 33% better than Trico's projections. Indeed, appellants claim, although Turbidy had not seen December 2004 EBITDA figures, he was aware that the total EBITDA from October and November had already surpassed Trico's projections for the quarter as a whole.

The bankruptcy court asserted that Turbidy's testimony at the confirmation hearing had to be

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[3] It should be noted that although the bankruptcy court specifically found that Turbidy had based his testimony on EBITDA, it observed that any dispute about whether Turbidy's testimony was based on revenue or EBITDA was "largely immaterial under the Salsbergs' theory because the percentage changes [between projections and actual results] were approximately the same." Trico IV, 374 B.R. at 538. That said, Turbidy's focus on EBITDA was central to the bankruptcy court's analysis and therefore, on appeal, will furnish the basis for this Court's analysis.

understood in the context of the "bigger picture" of Trico's general financial health at the time. Id. at 539. Despite substantial EBITDA growth in November 2004, Trico posted negative operating cash flow in the same month, and its cash had declined by $2.55 million. It also suffered net operating losses and negative operating cash flow in October and November. Trico's fourth quarter and annual results, published after the confirmation hearing but introduced into evidence at trial, "confirmed Trico's bleak financial prospects," id., showing net operating losses of $8.5 million, negative cash flow from operations totaling $4.5 million, and a cash loss of $3.3 million in the month of December 2004 alone. Against this backdrop of a "company teetering on the brink of survival," id. at 538-39, the $1.3 million difference between Trico's projected and actual EBITDA that existed at the time of the confirmation hearing "was only 'slightly' higher than the projections." Id. at 539. That is, "when Turbidy testified that fourth quarter EBITDA was slightly but not materially higher, he was referring in general to the valuation of Trico, and specifically, to the effect that the slightly higher quarterly EBITDA had on Trico's ability to meet a $9 million quarterly interest expense." Id. at 538.

Appellants contend that Trico's fourth quarter EBITDA was substantially higher than the projections, and that the bankruptcy court therefore clearly erred in crediting Turbidy's testimony to the effect that EBITDA was only "slightly higher." Their challenge takes a variety of forms, each of which fails.

First, appellants rely on several internal Trico

reports stating that the company experienced "dramatically" higher EBITDA and revenue than was set forth in the projections included in Trico's disclosure statement. But the bankruptcy court's decision turned heavily on the context in which Turbidy testified, and the general backdrop against which the $1.3 million difference from EBITDA projections was to be evaluated. Whether described as "dramatically" or "slightly" higher, there is no dispute as to the figures themselves. Appellants' citation to these reports, which emanated from an entirely different context, does nothing to undermine the bankruptcy court's finding concerning the veracity of Turbidy's testimony in the context of the confirmation hearing.

Second, appellants appear to contend that Trico's fourth quarter EBITDA was actually sufficient to meet the company's quarterly interest expense, and that the bankruptcy court's finding was accordingly erroneous. Appellants observe that Trico's fourth quarter EBITDA was $5.4 million, and that the special charges Trico was required to pay amounted to $4.9 million. Together, this $10.3 million would have been sufficient to meet Trico's $9 million quarterly interest. This argument fails, however, because it does not account for the fact that Trico did in fact have to pay the special charges. Even if the quarterly interest charge was $7.6 million, as appellants contend in conclusory fashion, its $5.4 million in actual EBITDA was plainly insufficient to meet its debt.

Third, in a transparent effort to adjust artificially the standard of review applicable to their appeal,

appellants contend that this exclusively fact-based dispute presents an issue of law to be reviewed de novo. They pose this putative issue of law: "If a witness knows a fact and is asked about that fact at trial but misunderstands the question and answers a different question and gives an answer that is true as to the question-not-asked but false as to the question-actually asked, has the witness testified falsely?" This is hardly a legal issue. Rather, appellate consideration of Turbidy's testimony focuses exclusively on whether the facts adduced by the bankruptcy court in determining that Turbidy testified truthfully were clearly erroneous.

Finally, appellants contend that even if Turbidy did not intentionally mislead the bankruptcy court with his false testimony, he was recklessly indifferent to the falsity of his statements. But in the context of a fraud claim, "reckless indifference" is only pertinent if the statements at issue were in fact untrue. As the Second Circuit has held, liability lies for fraud under New York law only for statements "known by defendant to be untrue or recklessly made." Suez Equity Investors, L.P., 250 F.3d at 104. "Known to be untrue" and "recklessly made" are simply two different knowledge standards. The requirement that the statements at issue actually be untrue remains the same. Because the bankruptcy court found that the statements were in fact true, and because this finding was not clearly erroneous, this argument fails.

In sum, none of appellants' arguments demonstrates clear error in the bankruptcy court's finding that Turbidy testified truthfully as to Trico's fourth

quarter EBITDA results. This finding is therefore affirmed.

III. Turbidy's Alleged Omissions

Appellants contend that Turbidy had an obligation to disclose at the confirmation hearing certain information he knew concerning Trico's steadily improving financial health, including, for example, the expiration in 2005 of contracts unfavorable to Trico. They aver that Trico's fourth quarter 2004 performance was an improvement over the rest of that year's performance, and that "Trico had been climbing steadily out of the 'cellar'" since the first quarter of 2004. "With full disclosure," appellants contend, the bankruptcy court would have perceived "at least a material possibility that Trico's prospects were substantially improved," and would have declined to confirm the reorganization plan.

With only one exception, these alleged omissions are raised for the first time on appeal. Although they now contend that there was certain information "Turbidy was obliged to disclose even if he was not being deceptive in the answers he gave to the questions he was asked," appellants represented before the bankruptcy court that the court did not need to "determine that Mr. Turbidy had an affirmative, independent obligation to disclose" anything. Indeed, there is no evidence that appellants raised any of these particular omissions before the bankruptcy court. Because appellants now advance an argument they

specifically repudiated below, this argument will not be considered for the first time on appeal.[4] See Singleton v. Wulff, 428 U.S. 106, 120 (1976).

The sole alleged omission considered by the bankruptcy court concerned the three special charges that deflated Trico's fourth quarter EBITDA. The Salsbergs argued before the bankruptcy court that "even if Turbidy's testimony was technically correct, he should have voluntarily disclosed that the 'slightly' but not 'materially' better fourth quarter EBITDA was negatively impacted by three special, unusually large expenses." The bankruptcy court first ruled that, as an accounting matter, it was appropriate for Trico to deduct these expenses from its income in calculating its EBITDA. Having found no accounting impropriety, the court then found that the Salsbergs had "failed to show that Turbidy intended to deceive anyone when he referred to the fourth quarter EBITDA, without stating that the result included the special UK pension charge." Trico IV, 374 B.R. at 540. On appeal, appellants have not specifically controverted the bankruptcy court's finding, nor have they adduced any facts to show that the bankruptcy court was in error.

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[4] In addition, to the extent appellants' argument on appeal turns on the materiality of Turbidy's alleged omissions, that was not in issue at trial. Indeed, as the bankruptcy court noted, "the materiality and valuation issues were severed at the Salsbergs' request." Trico IV, 374 B.R. at 539 n.9. To the extent appellants argue that Trico was actually solvent at the time the reorganization plan was confirmed, appellants have waived this argument because they appeal only from the bankruptcy court's judgment after a trial limited to their own fraud claim.

Accordingly, the bankruptcy court's finding with regard to Turbidy's failure to reveal the fourth quarter special charges is affirmed.

II. Motion to Amend

Appellants "recognize that if the Court affirms the Bankruptcy Court's conclusions at the trial, there would be no factual support for the fraud-on-the-court claim and that the Bankruptcy Court's decision on amending would therefore be moot." Appellees do not dispute this contention. Accordingly, having found that the bankruptcy court's trial conclusions were not clearly erroneous, this Court need not address the appeal of the bankruptcy court's denial of appellants' motion to amend.

CONCLUSION

For the foregoing reasons, the decision of the bankruptcy court is affirmed. The Clerk of Court shall dismiss the appeal.

SO ORDERED:

Dated: New York, New York
February 21, 2008

/s/
DENISE COTE
United States District Judge

APPENDIX C

APPENDIX C: DECISION OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED AUGUST 23, 2007

Chapter 11 (Confirmed)
374 B.R. 529

Case No. 04-17985 (SMB)
Adv. Proc. 05-2313 (SMB)

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:

TRICO MARINE SERVICES, INC., et al.,

Debtors.

STEVEN SALSBERG, ESQ. and GLORIA SALSBERG,

Plaintiffs,

-- against --

TRICO MARINE SERVICES, INC., TRICO MARINE ASSETS, INC., TRICO OPERATORS, INC., and TRICO INTERNATIONAL, INC.

Defendants.

APPENDIX C

POST-TRIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

STUART M. BERNSTEIN
Chief United States Bankruptcy Judge:

This litigation arises from certain testimony given during the debtors' confirmation hearing held on January 19, 2005. The plaintiffs, Steven Salsberg ("Steven") and his mother, Gloria Salsberg ("Gloria," and collectively, the "Salsbergs"), hold warrants distributed under the debtors' confirmed plan (the "Plan"). They contend that Trevor Turbidy, the debtors' chief financial officer, lied about the debtors' financial performance during the fourth quarter of 2004, this testimony induced the Court to confirm the Plan, and the confirmed Plan unfairly wiped out the existing equity, including Steven's. Steven subsequently transferred a portion of his fraud-based claim to Gloria.

The Court conducted a trial on May 21, 2007, limited to the issue of whether Turbidy knowingly lied at the confirmation hearing about the debtors' fourth quarter financial performance with the intent to deceive. The Salsbergs had requested a limited trial to avoid the potential expense of a valuation trial in the event the Court concluded that Turbidy had not knowingly lied. For the reasons that follow, the Court concludes that the Salsbergs failed to sustain their burden of proof, and accordingly, their complaint is dismissed.

APPENDIX C

BACKGROUND[1]

The dispute between the parties was the subject of three earlier opinions reported at Salsberg v. Trico Marine Servs., Inc. (In re Trico Marine Servs., Inc.), 360 B.R. 53 (Bankr. S.D.N.Y. 2006), Salsberg v. Trico Marine Servs., Inc. (In re Trico Marine Servs., Inc.), 343 B.R 68 (Bankr. S.D.N.Y. 2006) and Salsberg v. Trico Marine Servs., Inc. (In re Trico Marine Servs., Inc.), 337 B.R. 811 (Bankr. S.D.N.Y. 2006). These decisions explain some of the background, and give context to the trial.

A. The Events Leading to the Chapter 11 Petitions

At all relevant times, Trico Marine Services, Inc. ("Trico Services") and its direct and indirect subsidiaries were engaged in the business of providing marine support services on a global basis to the oil and gas industry. (DX A, at I-4.)[2] Their fleet consisted of more than 80 vessels used to transport drilling materials, crews and supplies needed to construct, install, maintain and remove offshore drilling facilities and

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[1] The trial transcript is cited as "Tr." followed by the page. "PX" refers to plaintiffs' trial exhibits and "DX" refers to the defendants' trial exhibits. Finally, "CH" refers to the transcript of the confirmation hearing held on January 19, 2005. The entire transcript of the confirmation hearing was received into evidence as DX B.

[2] DX A, the Disclosure Statement, was not received into evidence. Both sides nevertheless relied on it at trial and in their post-trial submissions. Accordingly, the Court deems it to be part of the trial record.

equipment. (Id.) Trico Services and its domestic subsidiaries — Trico Marine Assets, Inc. ("Trico Assets") and Trico Marine Operators, Inc. ("Trico Operators") — will be referred to collectively as "Trico."

Trico's principal obligations consisted primarily of three debts. First, on May 31, 2002, Trico Services issued $250 million of 8 7/8% Senior Notes due 2012 (the "Senior Notes"), pursuant to the terms of a senior note indenture, also dated as of May 31, 2002. The Senior Notes were unsecured obligations of Trico Services, senior in right of payment to any future subordinated indebtedness. (Id. at I-5.) Trico Assets and Trico Operators guaranteed this debt. Second, on February 12, 2004, Trico Assets and Trico Operators entered into a $55 million credit agreement with several lenders, which was scheduled to mature in 2009 (the "Credit Agreement"). The Credit Agreement debt was collateralized by 43 vessels, together with any revenue earned by the vessels, and a pledge of the capital stock of Trico Operators and Trico Assets. Trico Services guaranteed the Credit Agreement debt. (Id.) Third, Trico Operators and General Electric Capital Corporation were parties to a Master Bareboat Charter, dated September 30, 2002 (the "Master Bareboat Charter"), pursuant to which Trico Operators sold and leased back three of its crew boats. Trico Services and Trico Assets guaranteed the obligations under the Master Bareboat Charter. (Id.) Consequently, Trico Services and its two domestic subsidiaries were primarily or secondarily liable for the same principal debts.

In 2001, Trico began to experience declining oper-

ating results, and eventually reported operating losses. (Id. at I-6.) In July 2003, Standard & Poor's Ratings Services ("S&P") began downgrading Trico's credit ratings, and by the end of April 2004, Trico's publicly traded stock price had declined more than 80% from the beginning of 2004. Shortly thereafter, S&P placed Trico's corporate credit rating on credit watch. (Id.) On May 10, 2004, Trico announced that it would use the 30-day grace period to meet the $11.1 million interest payment, due May 15, 2004, on its Senior Notes. (Id.) On June 15, 2004, Trico announced that it would not make the payment of interest due under its Senior Notes within the permitted 30-day grace period, (id. at I-7), and on September 15, 2004, the lenders under the $55 million Credit Agreement accelerated payment of the entire debt. (Id.)

Given its dire financial situation, Trico began negotiating a "pre-packaged" plan with a noteholder group in June 2004. The parties agreed to a term sheet embodying a Plan Support Agreement (the "Plan Support Agreement"), and in September 2004, more than 67% of the outstanding Senior Notes agreed to it. (Id.) In a nutshell, the Plan Support Agreement provided that Trico's existing common stock (the "Old Common Stock") would be cancelled, and New Common Stock would be distributed to the holders of the Senior Notes (the "Senior Noteholders") in satisfaction of their claims. The holders of the Old Common Stock would receive warrants, exercisable at the times and prices set forth in the agreement. (Id.) Trico's remaining obligations would not be affected. (Id.)

On November 12, 2004, Trico filed the Disclosure

Statement with the United States Securities and Exchange Commission, outlining Trico's Plan. Exhibit C to the Disclosure Statement included financial projections for revenue and EBITDA[3] from 2004 through 2009. (Id., Ex. C, at 7.) For 2004, Trico projected total revenue of $103.7 million, and EBITDA of $13.6 million. (Id.) The 2004 projections were based on Trico's actual financial results through September 30, 2004, (id., Ex. A, at 5 (Art. I.A.59)), and the projected results for the fourth quarter. (See Tr. at 53.) The Disclosure Statement did not break out the quarterly projections. At trial, Trico stipulated that as of the date of the Disclosure Statement, Trico had projected fourth quarter revenue and EBITDA of $24.9 million and $4.1 million, respectively. (Tr. at 40-41.)

B. The Chapter 11 Cases and the Confirmation Hearing

On December 21, 2004, Trico commenced chapter 11 cases in this Court for the purpose of confirming the pre-packaged Plan. By then, its estimated total pre-restructuring indebtedness was $389.8 million, (DX A, at I-8), and its annual interest expense for 2004 was estimated to be $32.4 million. (Id., Ex. C, at 7.) Of that sum, the Senior Notes accounted for $250 million in principal and $24.8 million in interest. (See id., Ex. C., at 5, 6.) The proposed Plan would eliminate this entire Senior Note debt, aggregating approximately $275 million, from the liability side of the balance

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[3] "EBITDA" stands for earnings before interest, taxes, depreciation and amortization.

sheet. Absent confirmation, the projected 2004 EBITDA would fall approximately $19 million short of the amount needed just to pay the 2004 interest expense due on the Senior Notes.

Since all the voting had been completed pre-petition, the Court scheduled a combined hearing to approve the Disclosure Statement and confirm the Plan for January 19, 2005. On January 10th, Steven filed an objection to the Plan "on behalf of SSRS Partners and all holders of the Common Stock of Trico Marine Services, Inc." Steven, however, is a non-practicing lawyer who is not a member of the New York bar. Accordingly, he could not represent SSRS or anyone else other than himself. At the time he filed the objection, he did not personally own any Trico stock, but on January 14, 2005, he acquired 44,000 shares. (Tr. at 158-59, 161; PX 61, at TR10.)

The combined hearing went forward on January 19, 2005. The Court approved the Disclosure Statement, (CH at 20), and turned to the Plan. Trico called one witness, Richard NeJame. NeJame is a director in the restructuring advisory group at Lazard Freres, (id. at 30), and was qualified to testify as an expert in fields of valuation and restructuring. (Id. at 32-33.) He explained that following initial due diligence, he concluded that Trico's liabilities exceeded its assets, and that it could not meet its obligations as they became due. (Id. at 36.) NeJame and his team then conducted a more exhaustive analysis, and valued Trico using the "comparable companies" and "discounted cash flow" methods. (Id. at 48-49.) The valuation exercise relied on projections prepared by

Trico, but NeJame made his own assessment and validated the company's projections. (See id. at 50, 78-79, 81.) After this more extensive analysis, NeJame opined that Trico's total enterprise value fell between $225 million and $245 million, (id. at 49), and if the absolute priority rule were applied, the shareholders would receive nothing, i.e., Trico was insolvent. (Id. at 60-61.) NeJame projected Trico's post-consummation net equity, following the elimination, inter alia, of the liability under the Senior Notes, to be $110 million. (Id. at 49; accord DX A, Ex. C, at 5 (Pro Forma Reorganized Balance Sheet).) In other words, the Senior Noteholders were receiving between 35% and 45% of what they were owed. (CH at 86.)

Steven cross-examined NeJame extensively. NeJame testified that his valuations were based on the information available to him in October. He did not update his analysis based on subsequent events, (see id. at 83-84), and did not know Trico's fourth quarter results. (Id. at 109.) The Senior Notes were currently "trading in the 60s." (Id. at 86-87.) If the trading price was used to determine value, it would add approximately $40 to $50 million to the $110 projection. (Id. at 87.) NeJame also testified that if one substituted the higher revenue projections contained in Steven's objection, Trico's value did not necessarily increase. The financial forecast would involve more risk, and as a result, might require use of a higher discount rate or lower EBITDA multiple. (Id. at 102.) Nevertheless, because a large component of Trico's operating costs were fixed, between 70% and 80% of any additional revenue would go "straight down to EBITDA." (See id. at 103-04.) Consequently, any

error in revenue projection would "make a big difference in the EBITDA bottom line." (Id. at 104.) NeJame emphasized, however, that Trico was projecting — and his valuations assumed — a quadrupling in EBITDA from 2004 to 2008. (Id.) If Trico outperformed its projections in the next couple of years, this would reflect a slight acceleration in the forecasted recovery. (Id. at 105.)

Trico rested its direct case after NeJame finished, and Steven called Turbidy in his (Steven's) direct case. The direct examination began:

> Q: Good afternoon. Do you know what the fourth quarter revenues are for Trico?
>
> A: We have not finished our fourth quarter consolidation yet. So, no, I don't have an estimate for that number.
>
> Q: Do you have a preliminary estimate?
>
> A: I wouldn't be allowed to disclose that under FD[4] at this point.

(CH at 118.) In addition to the concern expressed by Turbidy regarding Regulation FD, Trico's counsel questioned the relevance. He argued that the Plan was based on 20 quarterly projections, and an uptick in one

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[4] Turbidy was referring to SEC Regulation FD, 17 C.F.R. §§ 243.100, et seq. In general, Regulation FD prohibits certain non-public, or selective, disclosures of material non-public information regarding an issuer or its securities.

quarter was not material. (Id. at 120.) The Court overruled the objection, and directed Turbidy to answer the question. (Id. at 121.) After some further colloquy, the Court posed a question that elicited the following exchange:

> THE COURT: Let me ask the question. What did you project — did you have a projection for the fourth quarter of 2004?
>
> THE WITNESS: Yes, we did.
>
> THE COURT: What was that projection?
>
> THE WITNESS: I don't recall the exact number of revenue projections.

(Id. at 121-22.) After a brief colloquy, the questioning continued, and Turbidy provided the following testimony, which forms the core of the Salsbergs' case:

> THE COURT: Do you recall whether your actual experience[5] for the fourth quarter of 2004 was higher, lower, or consistent with the projected results?
>
> THE WITNESS: In total, 2004 was consistent with our projections.
>
> THE COURT: Just the last quarter?

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[5] The transcript of the confirmation hearing read "expense" rather than "experience," but the parties agree that the question was transcribed incorrectly. (Tr. at 19.)

THE WITNESS: It was fairly consistent. Yes. It wasn't spot on, dollar for dollar.

THE COURT: Is it higher or lower?

THE WITNESS: I believe it was slightly higher.

THE COURT: I'll take that answer, they higher –they did better than projected. I understand their concern by disclosing in a court, particularly a preliminary analysis, but they're saying they did better. I think that answers your question.

BY MR. SALSBERG:

Q: How much better?

A: Not materially.

(Id. at 122-23.)

Steven rested after Turbidy testified. Following argument, the Court overruled Steven's objection and confirmed the Plan. Addressing the valuation issue, the Court relied on NeJame's testimony, concluding that Trico was "hopelessly insolvent," and anything that equity received by virtue of the Plan Support Agreement was a "gift." (Id. at 137.) The Court did not mention Turbidy or his testimony in its bench decision.

C. This Adversary Proceeding

Steven did not appeal from the order confirming the Plan. Instead, after he transferred some of the warrants distributed under the Plan to Gloria, the Salsbergs commenced this adversary proceeding on July 19, 2005 to vacate the confirmation order pursuant to 11 U.S.C. § 1144.[6] The nub of their claim is that Turbidy committed perjury when he testified about the actual fourth quarter results, and the confirmation order was, therefore, procured by his fraud. The Court ruled, in response to Trico's motion, that it could not vacate the confirmation order, but granted the Salsbergs leave to amend their complaint to assert damage claims. Salsberg v. Trico Marine Servs., Inc. (In re Trico Marine Servs., Inc.), 337 B.R. 811 (Bankr. S.D.N.Y.), adhered to on rearg., 343 B.R. 68 (Bankr. S.D.N.Y. 2006). The Court also denied the Salsbergs' motion for leave to further amend their complaint to assert a claim against Turbidy based on "fraud on the court." 337 B.R. 816. The Court subsequently

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[6] Section 1144 provides:

> On request of a party in interest at any time before 180 days after the date of the entry of the order of confirmation, and after notice and a hearing, the court may revoke such order if and only if such order was procured by fraud. An order under this section revoking an order of confirmation shall –
>
> (1) contain such provisions as are necessary to protect any entity acquiring rights in good faith reliance on the order of confirmation; and
>
> (2) revoke the discharge of the debtor.

scheduled a trial, limited to the issues of falsity and scienter, i.e., whether Turbidy knowingly lied about the 2004 fourth quarter results with the intent to deceive.

The trial evidence indicated that by the time of the confirmation hearing, Turbidy knew that Trico had exceeded its fourth quarter projections of both revenue and EBITDA. He had received periodic reports, concerning Trico's performance. The "October 2004 Financial Statement Highlights" stated that the "Actual Revenue results were dramatically higher than the Model due to" higher utilization rates and reductions to the G & A expense. The October revenues and EBITDA were $10,402,000 and $3,251,000, respectively. (PX 5, at TRM010923.) The "November 2004 Financial Statement Highlights" contained similar language, (see PX 6, at TRM010881), and reported November revenue and EBITDA of $11,004,000 and $2,348,000, respectively. (Id.) Finally, on January 4, 2005, Turbidy received the "Flash Report" for December that showed revenues of $11,862,000. (PX 36, at TRM010784.) The "Flash Report" did not include the December EBITDA.

By the time he testified, Turbidy knew that Trico had achieved actual fourth quarter revenue of $33.3 million, a number still subject to possible downward adjustments based on fuel adjustments and other adjustments to customers. (Tr. at 25-26, 54, 58.) Trico had projected $24.9 million in fourth quarter revenues. Turbidy also knew that Trico had projected that EBITDA for the fourth quarter of 2004 would be $4.1 million, but the aggregate EBITDA for October and

November already totaled $5,599,000. Turbidy was not sure whether he had received information regarding the December 2004 EBITDA by then, (id. at 26), but he understood that two large expenses would hit in December – one relating to inventory valuation and the other concerning a United Kingdom pension obligation. (Id. at 34.)

The "December 2004 Financial Statement Highlights," (PX 12, at TRM010810), issued after the confirmation hearing, supplied the missing information. EBITDA was negative in December, ($459,000), and the parties stipulated that the fourth quarter EBITDA was $5.4 million. (Tr. at 31.) Once again, "Actual Revenue was dramatically higher than the Model," (PX 9, at TRM010835), but operating expenses were also "dramatically higher" due to "special charges" for the UK pension plan ($2.7 million), an adjustment to a redundancy (severance) reserve ($700,000) and an inventory reserve ($1.5 million). (Id. at TRM010835-36.)

Turbidy testified, in substance, that the UK pension was a recurring charge in the sense that it was recalculated every six months. (Tr. at 64-65, 115-17.) Nevertheless, Trico had not expensed any amounts to the UK plan in 2002 or 2003, (PX 48, at 76), and the Disclosure Statement projections did not take a possible end-of-the-year pension charge into account. (Tr. at 71.) By the time of the confirmation hearing, Turbidy anticipated an unusually large charge, even if he did not know what the actual number would be. He knew that the pension charge would "severely impact" fourth quarter EBITDA. (Id. at 64.)

D. The Parties' Contentions

The Salsbergs attribute one misstatement and one omission to Turbidy. First, they contend that he knowingly made a misrepresentation, or at a minimum, acted with reckless disregard of the truth, and with intent to deceive, when he testified that the 2004 fourth quarter results were fairly consistent and slightly but not materially higher than the fourth quarter projections. The Salsbergs assert that the actual results were dramatically higher. Second, the Salsbergs argue that Turbidy fraudulently concealed the fact that the actual fourth quarter EBITDA results were depressed by unusually large special charges. (Plaintiffs' Proposed Findings of Fact & Conclusions of Law, at pp. 45-46, dated June 28, 2007 ("Plaintiffs' Proposed Findings & Conclusions")) (ECF Doc. # 84.) The defendants disputed both contentions, and raised several other issues beyond the limited scope of the trial.

DISCUSSION

A. Gloria's Standing

The Court sua sponte raised the question of Gloria's standing. Steven assigned warrants to Gloria after the confirmation hearing, and her ownership of the warrants formed the basis of her standing in this proceeding. Under New York law, the assignment of a contract right does not automatically include fraud claims relating to the contract. Trico, 360 B.R. at 57; see Banque Arabe et Internationale D'Investissement v. Maryland Nat'l Bank, 57 F.3d 146, 151 (2d Cir.

1995); Fox v. Hirschfeld, 142 N.Y.S. 261, 263-64 (N.Y. App. Div. 1913). The question is one of the parties' intent. See Banque Arabe, 57 F.3d at 151-52.

Gloria testified at the trial that Steven orally transferred all claims associated with the warrants at the time of the assignment, (Tr. at 154-55), and specifically mentioned fraud claims. (Id. at 157.) Steven confirmed her account. (Id. at 160-61.) Their testimony supports the finding that Steven transferred whatever fraud claim he owned that was connected with the transferred warrants, and accordingly, Gloria has standing to assert the fraud claim in this adversary proceeding.[7]

B The Fraud Claim

The Salsbergs relied on New York law in identifying the elements of their fraud claim. (See Plaintiffs' Proposed Findings & Conclusions, at pp. 39-40, 46-48)(ECF Doc. #84.) Trico did not challenge their reliance on New York law, and the Court will, therefore, apply it.[8] Krumme v. WestPoint Stevens Inc., 238 F.3d 133, 138 (2d Cir. 2000)(if both sides treat New

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[7] Trico had also questioned Steven's standing. Although he did not personally own any shares of Old Common Stock when he filed his objection to confirmation, Steven owned Old Common Stock at the time of the confirmation hearing. Accordingly, he has standing to assert the fraud claim in this case.

[8] In any event, the elements of fraud under New York law and federal common law are the same. Marcus v. AT&T Corp., 138 F.3d 46, 63 (2d Cir. 1998); accord Seanto Exports v. United Arab Agencies, 137 F. Supp. 2d 445, 451 (S.D.N.Y. 2001).

York law as controlling in their memoranda, this is sufficient to establish New York as the governing law). "A New York common law fraud claim is defined as a representation of fact, which is untrue and either known by defendant to be untrue or recklessly made, which is offered to deceive and to induce the other party to act upon it, and which causes injury." Suez Equity Investors, L.P. v. Toronto-Dominion Bank, 250 F.3d 87, 104 (2d Cir. 2001); Jo Ann Homes at Bellmore, Inc. v. Dworetz, 250 N.E.2d 214, 217 (N.Y. 1969).

To establish the elements of a fraudulent concealment claim, the plaintiff must also show that the defendant had a duty to disclose the material information. Banque Arabe, 57 F.3d at 153. A duty to disclose may arise from the need to clarify a prior partial or ambiguous statement, or from a fiduciary or confidential relationship between the parties. Id. at 155. A duty to disclose may also arise if "(1) one party has superior knowledge of certain information; (2) that information is not readily available to the other party; and (3) the first party knows that the second party is acting on the basis of mistaken knowledge." Id.

1. Turbidy's Actual Misstatement

Trico projected revenue and EBITDA of $24.9 million and $4.1 million, respectively, in the fourth quarter. It achieved actual revenue and EBITDA of $33.3 million and $5.4 million, respectively. Thus, Trico outperformed its revenue and EBITDA projections by 33.73% and 31.71%, respectively. When questioned about Trico's "actual experience" compared to the projections, Turbidy testified that the

preliminary results were "fairly consistent" with the projections, but were not "spot on" "dollar for dollar," that they were "slightly higher" but not "materially better." Focusing on the percentage relationship between the projected and actual results, the Salsbergs contend that the actual results were dramatically better, and that Turbidy committed fraud by minimizing the disparity.

At the outset, the Salsbergs maintain that Turbidy was talking about revenue, but according to Turbidy, he was focusing on EBITDA. (Tr. at 96-97, 135-36.) The dispute is largely immaterial under the Salsbergs' theory because the percentage changes were approximately the same.

In any event, I find that Turbidy testified credibly when he said that his answers were focusing on EBITDA, not revenue. The questions were admittedly vague. At one point, he was asked about "revenue," but I subsequently asked Turbidy about Trico's "actual experience." He answered the question with reference to EBITDA because EBITDA (and cash flow) directly reflected Trico's financial health and the ability to pay its bills. (Tr. at 44, 63, 86.) Trico's 2004 Form 10K, published after the confirmation hearing, supports the testimony regarding his mindset. It noted that during the reorganization, Trico focused primarily on cash flow from operations and net changes in cash and cash equivalents in order to fund operations, maintain the fleet and service its debt. (PX 48, at 23.)

Turbidy also testified that his statements about materiality were not directed at a comparison between

the projected and actual EBITDA results. Instead, he was referring to Trico's EBITDA in relation to Trico's overall valuation based upon his understanding that the purpose of the hearing was to determine the valuation of Trico. (Tr. at 97.) Indeed, this was the purpose of NeJame's testimony. Thus, when Turbidy testified that fourth quarter EBITDA was slightly but not materially higher, he was referring in general to the valuation of Trico, and specifically, to the effect that the slightly higher quarterly EBITDA had on Trico's ability to meet a $9 million quarterly interest expense. (See id. at 101-02, 106-07.) I also find this testimony credible.

In light of Turbidy's credible testimony, I conclude that the Salsbergs failed to demonstrate that Turbidy's testimony was false. The last comprehensive financial snapshot that Turbidy saw prior to the confirmation hearing, the December 29, 2004 e-mail and accompanying November 2004 financials (PX 6), showed a company teetering on the brink of survival. Despite the positive revenue and EBITDA in November, Trico had still booked approximately $2.23 million in net operating losses. (Id. at TRM010871.) Furthermore, Trico's two barometers of health, changes in cash flow from operations and net changes in cash position, were headed in the wrong direction. During November, Trico booked $3.13 million in negative operating cash flow, (id. at TRM010870), and its cash had declined by $2.55 million. (Id. at TRM010873.) Trico had also suffered net operating losses and negative operating cash flow during the first two months of the fourth quarter, (id. at TRM010870-71), and its cash had declined in the approximate amount

of $3.8 million. (Id. at TRM010873.) Year to date, Trico had experienced net operating losses of $49.4 million, (id. at TRM010871), negative operating cash flow of over $10 million, (id. at TRM010873), and a $9.4 million decrease in cash. (Id. at TRM010873.) In short, the relevant financial criteria spelled trouble for Trico.

The fourth quarter and annual results, published after the confirmation hearing, confirmed Trico's bleak financial prospects. During December 2004, net operating losses totaled $8.5 million, (PX 12, at TRM010810), negative cash flow from operations was $4.5 million, (id. at TRM010811), and cash declined by $3.3 million. (Id. at TRM010813) According to the 2004 Form 10K, Trico suffered a net operating loss of almost $48.7 million in 2004, (PX 48, at 43), cash flow from operating activities declined by $14.76 million, (id. at 45), and cash and cash equivalents dropped by $12.7 million. (Id.) "Management's Discussion and Analysis of Financial Condition and Results of Operation" stated that "2004 has been a difficult year," and Trico's "key markets remained depressed throughout much of the year, driving operating results and cash flows to deteriorate substantially." (PX 48, at 22.) Although day rates and utilization rates in Trico's key markets "experienced some rebound" from three-year lows during the second half of 2004 and early 2005, as a result of increased repair and maintenance work generated by a Gulf of Mexico hurricane and less competition in the North Sea spot market, there was no assurance that this would continue. (Id.)

Viewed against this bigger picture — the picture

that Turbidy was viewing — the extra $1.3 million of EBITDA was only "slightly" higher than the projections. Moreover, coupled with NeJame's testimony that Trico had negative equity of approximately $240 million, the Salsbergs failed to show that the extra $1.3 million reflected materially better performance, materially affected Trico's enterprise value, or turned Trico's red ink to black.[9]

I also conclude that the Salsbergs failed to demonstrate that Turbidy intended to deceive the Court. Having observed his demeanor while testifying, I found him to be honest, candid and forthright. I conclude that when he testified at the confirmation hearing, he held the honest belief that the actual results for the fourth quarter EBITDA, which were not then final and were subject to credit and other adjustments, including

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[9] Although the materiality and valuation issues were severed at the Salsbergs' request, some of the same evidence was relevant to the issues of falsity and Turbidy's intent to deceive. For example, the Salsbergs challenged the testimony that the actual fourth quarter results were not "materially" better than the projections. To establish falsity, the Salsbergs had to show that the actual fourth quarter results were "materially" better. Similarly, a lack of materiality would cut against a motive to lie, and hence, the inference that Turbidy intended to deceive anyone. Cf. In re Trex Co. Secs. Litig., 454 F. Supp. 2d 560, 586 (W.D. Va. 2006)("any allegation of scienter based on the defendants' alleged knowledge or reckless disregard of the falsity of statements or omissions that the court has herein found to be immaterial must fail as a matter of law"). The bifurcation of the materiality and valuation issues did not free the Salsbergs from the obligation to adduce evidence of materiality or valuation to the extent the evidence was relevant to the questions of falsity or intent.

a large UK pension charge, would not be appreciably higher or materially better than the fourth quarter EBITDA projection. In reaching this conclusion about his credibility, I reject the Salsbergs' contention that Turbidy was biased, or that the option to purchase New Common Stock, granted to Turbidy under the Plan, (see DX A, at I-9), or any other personal benefits that might be conferred upon him under a confirmed Plan, turned him into a perjurer.

2. Turbidy's Fraudulent Concealment

The Salsbergs also contend, in substance, that even if Turbidy's testimony was technically correct, he should have voluntarily disclosed that the "slightly" but not "materially" better fourth quarter EBITDA was negatively impacted by three special, unusually large expenses — the $2.7 million UK pension charge, the $1.5 million inventory reserve and the $700,000 severance reserve. Without these expenses, the fourth quarter EBITDA would have been $10.3 million.

The Salsbergs do not argue that Trico was guilty of any accounting improprieties, and there is nothing in the record to suggest it was. Accordingly, I conclude that it was appropriate, as an accounting matter, to deduct these expenses from income in computing the actual EBITDA. Hence, the EBITDA was accurately stated. Consequently, the question comes down to the following: although the special charges were properly deducted from income in arriving at the fourth quarter EBITDA, did Turbidy nevertheless have a duty to disclose that the actual fourth quarter EBITDA reflected a reduction based on the three special

charges?

I have no trouble concluding that in general, Turbidy had a duty of candor, and hence, a duty to disclose material information; he was the chief financial officer of the debtor in possession. I find, however, that the Salsbergs failed to prove that Turbidy intended to deceive the Court or anyone else by failing to highlight the special charges. First, there is no evidence that Turbidy was aware of the impending charge for the $700,000 redundancy (severance) reserve. He testified that he foresaw the UK pension charge and the inventory reserve. (Tr. at 34.) Second, he never testified that the inventory reserve (ultimately, $1.5 million) was not taken into account when Trico made its 2004 projections. The only testimony was that the UK pension expense had not been considered.[10] (Id. at 71.)

Third, and most importantly, the Salsbergs failed to show that Turbidy intended to deceive anyone when he referred to the fourth quarter EBITDA, without stating that the result included the special UK pension charge. The Court has already found that Turbidy testified honestly and candidly at the confirmation hearing. Moreover, an increase of $2.7 in fourth quarter EBITDA would have been insufficient to cover the $9 million quarterly interest expense or the $19 million annual shortfall in the interest expense on the Senior Notes, and there is no evidence that it would have

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[10] There was no evidence that Trico foresaw the charge at the time that the projections were prepared.

made a dent in the over $200 million in negative equity. The lack of any material effect further undercuts a finding of intent to deceive.

The Salsbergs point out that Turbidy mentioned the UK pension charge during a May 11, 2005 "Earnings Call" with outsiders. Comparing the 2004 fourth quarter and 2005 first quarter vessel operating expenses, he stated that the fourth quarter expenses were $3.9 million higher,[11] but that "it's important to note that included in the fourth quarter of 2004 with a charge of 2.1 million [sic] for our UK pension plan." (PX 56, at 4.) It is apparent from the conversation that Turbidy was being conservative, and was trying to avoid the impression that Trico had drastically cut its vessel operating expenses. I do not infer from this that Turbidy intended to hide the same information at the confirmation hearing. The disclosure the Salsbergs would require would have had the opposite effect, suggesting that Trico's operations were more profitable than its books and records reflected.

Thus, the Salsbergs failed to show that Turbidy had any motive to conceal the information. Accordingly, I decline to find that he intended to deceive the Court or the parties when he testified at the confirmation hearing about the fourth quarter EBITDA, but failed to disclose that the result reflected an unusually large

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[11] The transcript of the call is a bit confusing. Initially, Turbidy seemed to say that the 2005 first quarter expenses had actually increased by $3.9 million. It appears, however, from the balance of the statement that the costs had decreased by that amount.

UK pension charge.

C. Burden of Proof

Finally, the parties argue over whether the Salsbergs had to prove their fraud claim by clear and convincing evidence or by a preponderance of the evidence. I conclude that they failed to satisfy their burden under either standard.

The foregoing constitutes the Court's findings of fact and conclusions of law in accordance with FED. R. CIV. P. 52(a), made applicable by FED. R. BANKR. P. 7052. The clerk is directed to enter a final judgment dismissing this adversary proceeding.

Dated: New York, New York
August 23, 2007

/s/
STUART M. BERNSTEIN
Chief United States Bankruptcy Judge

APPENDIX D

APPENDIX D: ORDER DENYING PETITION FOR RECONSIDERATION OR EN BANC CONSIDERATION DATED NOVEMBER 2, 2009

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 2nd day of November, two thousand and nine.

IN RE: TRICO MARINE SERVICES, INC.
TRICO MARINE SERVICES, INC.,

Debtor,

STEVEN SALSBERG, GLORIA SALSBERG,

Plaintiffs-Appellants,

v.

TRICO MARINE SERVICES, INC., TRICO MARINE ASSETS, INC., TRICO MARINE OPERATORS, INC.,

Defendants-Appellees.

APPENDIX D

ORDER

Docket Number: 08-1553-bk
[FILED NOVEMBER 2, 2009]

Appellant Steven Salsberg, Esq., Appellant Gloria Salsberg Appellants Gloria Salsberg, and Steven Salsberg, Esq., having filed a petition for panel rehearing, or, in the alternative, for rehearing en banc, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:

Catherine O'Hagan Wolfe, Clerk

By: /s/
Frank Perez, Deputy Clerk